IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 709 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **-Yes.**

2 To be referred to the Reporter or not ? **-Yes.**

3 Whether their Lordships wish to see the fair copy of the judgment ? **-No.**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **-No.**

5 Whether it is to be circulated to the civil judge ? **-No.**

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REGIONAL DIRECTOR - Appellant(s)
Versus
FATESINH MOHANSINH RATHOD & 3 - Defendant(s)

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Appearance :

MR HEMANT S SHAH for Appellant(s) : 1,
MS ASHA H GUPTA for Defendant(s) : 1,
NOTICE SERVED for Defendant(s) : 2 - 4.

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 19/07/2007

ORAL JUDGMENT

1. Regional Director, Employees' State Insurance

Corporation, Ahmedabad, appellant-original opponent has filed this appeal under Section 82(2) of the Employees' State Insurance Act, 1948 (herein above referred to as 'Act') against the judgment and award dated 9/1/2003 passed by the learned Judge, Employees' State Insurance Court, Vadodara in E.S.I. Application No.4 of 1991. By the impugned judgment, the learned Judge was pleased to allow the application. The learned Judge has held that the applicants are the heirs and legal representatives of the deceased Himmatsinh and directed the Regional Director, State Workmen Insurance Board to pay compensation from the date of death of deceased Himmatsinh i.e. 2/1/1991 in the present case with 9% interest and if there is a delay in payment, the Corporation has to pay 12% interest in this behalf.

2. Facts giving rise to this appeal are as under:

2.1) From the record of the case, it appears that Himmatsinh was working in ABS Plastic Ltd. as an Operator. On 30/12/1990, when Shri Himmatsinh was

working in the ABS Plastic Ltd. in the evening, there was an explosion and fire in the ABS Plastic Ltd. and in view of the same, the deceased was charred and ultimately he was expired on 2/1/1991. His death report was sent to the Police Inspector in this behalf. As per the postmortem report, it was held that deceased died due to explosion and fire in this behalf. He has died in course of employment in this behalf. Thereafter, after his death, the heirs and legal representatives of the deceased filed the application before the State Workmen Insurance Court at Baroda. Notice was issued to other side.

2.2) The applicants before the Court contended that as per the provisions of Section 2(9)of the Act which provides definition of 'employee' and 2(14) of the Act which provides definition of 'insured person', the deceased was working as an “employee” as well as “insured person” of ABC Plastic Ltd. His “contribution” as per Section 2(4) of the Act was deducted from 1/4/1990 to 30/9/1990. The employer has deducted the amount

in question for 183 (one hundred and eighty three) days and handed over the said amount to the Corporation.

3. On behalf of the opponents, original applicants, the learned advocate has produced several documentary evidences namely cutting of Gujarat Samachar dated 31/12/1990 at Exh.6/1 wherein the nature of accident has been referred in this behalf. The applicants also produced xerox copy of the accident report at Exh.6/2 which shows that accident took place due to fire explosion because of leakage of some chemical, xerox copy of death certificate at Exh.6/3 showing that the deceased expired on 2/1/1991, postmortem report at Exh.6/4 which shows that the deceased has expired on account of burn.

4. Before the Trial Court, the deposition of Shri Fatesinh Mohansinh Rathod (father of the deceased) was recorded. He was examined at Exh.7 where he has stated about the death of his son.

5. Opponents-original applicants have produced

statement of Employees State Insurance Corporation where the contribution deducted was mentioned at Sr. No.3 i.e. of Rs.317.05 which shows that the deceased has worked for 183 days and total amount of emoluments paid was Rs.14,084.50. As per the said statement, his daily wages was Rs.76.95.

6. It appears that the provisions of the Act particularly Section 97 of the Act which provide 'Power of Corporation to make regulations'. As stated above, under the said power, Regulation has been enacted which are called as “Employee State Insurance General Regulation” Act, 1950. Regulation 4 provides contribution and benefit periods and the corresponding benefits periods shall be as under:

Contribution period	**Corresponding benefit period**
1st April to 30th September	1st January of the year following to 30th June
1st October to 31st March of the year following.	1st July to 31st December

7. Before the Trial Court, the Manager of the ESI Corporation filed reply at Exh.3. In the said

reply, it was stated that the Manager of the Corporation investigated the case of the deceased, insured person on 22/1/1991, 24/1/1991 and 26/2/1991 and it was reported that the deceased person has met with an accident on 30/12/1990. Injury caused on account of explosion of fire which was occurred due to leakage of chemicals and ultimately the deceased died on 2/1/1991.

7.1 The original opponents have referred the letter dated 28/2/1991 addressed by the Corporation, wherein it was stated that in October, 1990, the deceased was drawing salary of Rs.1,785/- and also Rs.751/- as overtime allowance i.e. in all he was drawing Rs.2,537/- per month and thus, the deceased was not covered under the ESI Act. However, it has been stated that the Corporation has paid contribution for 183 days. Accident report was also produced. According to them, the employee was not covered as per Section 2(9) of the Act i.e. definition of 'employee' and hence, the opponent-Corporation has rejected his claim. It was further stated that original

applicants-opponents herein are not entitled to any benefit as prayed for. Therefore, the application of the opponents has to be rejected.

8. The Regional Director has also addressed a letter dated 30/5/1991, Exh.6/5 to the employer company wherein the Regional Director has stated the case of the “insured person” has not been admitted as of death due to employment injury. The dependent benefit in this case is not payable to the widow and minor children of the deceased.

9. On behalf of employer, one Shri Shaileshkumar Hasmukhlal Shah, Executive Officer of the Company was examined at Exh.8 and his deposition was also recorded wherein it has been submitted that the contribution period of the deceased was 1/4/1990 to 30/9/1990. For the said period, the contribution of the deceased was deducted and deposited before the ESI Corporation. His benefit period was from 1/1/1991 to 30/6/1991.

Trial Court's Finding:

10.When the matter was heard by the learned Trial Judge, the learned Trial Judge has considered the fact that the contribution of the deceased was from 1/4/1990 to 30/9/1990 and the employer has deducted the amount of contribution for 183 days and the same was deposited before with the Corporation. As per the Regulation 4, benefit period is from 1/1/1991 to 31/6/1991 and hence, as the accident took place on 30/12/1990 and the employee has died on 2/1/1991, he was entitled to the benefit in this behalf. The learned Trial Judge has considered all the evidence and also definition of “employee” and “insured person” and held that the the deceased was working on 30/12/1990 and at about 2:30 p.m., because of fire explosion, the deceased had scald on entire body and ultimately died on 2/1/1991. Therefore, he was an “employee” within the meaning of Section 2(9) of the Act and he was also an “insured person” within the meaning of Section 2(14) of the Act and therefore, the learned Judge has held that the deceased died due to the injuries of the accident and he was entitled to the insurance amount in this behalf. The employer has denied

the said in-justification in this behalf.

11.After going through the evidence on record and as per the regulations, the learned Judge has held that the applicant is covered by the contributory period and is entitled to the benefit under Section 46 of the Act which provides benefit as per chapter-V of the Act. The Court has further held that the respondent has not been able to prove that the deceased was not entitled for the benefit and ultimately allowed the application of the original applicants in this behalf. The Tribunal has awarded 9% interest from the date of the death and also held that if the respondent is failed and neglected to pay the same within thirty days from the date of judgment, the respondent-corporation has to pay 12% interest in this behalf.

Contentions on behalf of the Corporation:

12.Being aggrieved and dissatisfied with the same, Mr.Hemant Shah, learned advocate for the appellant herein has filed this appeal and assailed the

order of the Court below. He has stated that deceased Himmatsinh Rathod was not an “employee” in view of Section 2(9) of the Act. He has further stated that the learned Judge has erred in not considering that no contribution has been paid by the employer and/or employee during the relevant period and has not deposited any contribution with the appellant corporation and, therefore, the Lower Court ought to have held that the opponents are not entitled to any benefits under the law. He has further stated that deceased was drawing more than Rs.1,600/- per month on the date of the accident and he is not entitled to any benefit under the ESI Act and therefore, on this ground alone, the Lower Court ought to have rejected the application of the opponents.

13. On behalf of employer, the learned advocate has produced Employees State Insurance Corporation Injury Report. According to the same, the deceased was not covered under Section 2(9) of the ESI Act on the date of his death. Mr.S.K.Valia, Manager has signed the report in this behalf.

Along with the said investigation report showing that it was death case of ABS Plastic Limited, was also annexed. According to that report also, the deceased was not covered by the ESI Act. On behalf of the employer, Corporation, one Mr.Shanalal Kalidas Valera was also examined at Exh.13. He has stated that he has been shown accident report which was filled up by ABS Plastic Limited. He has stated that the employer has stated that the employee was not covered by the benefit of ESI Act. However, it was admitted that the employee was covered up to 30/9/1990. In his cross-examination, he has stated that the case of the deceased was discussed on the ground that the death was not in the course of employment. However, he has admitted that the deceased contribution was taken from April, 1990 to September, 1990. He has stated the deceased was not covered by the benefit period. He has further stated that as per the Regulation 4, the case is not covered by the accident in this behalf. He has admitted that there was accident in the factory and there was a fire and because of that, the deceased had expired on 2/1/1991.

14.On the other hand, Ms.Asha Gupta, learned advocate for the respondent has tried to support the order of the learned Trial Judge. She has stated short facts of the case that accident took place on 30/12/1990. He has expired on 2/1/1991. So, as per Regulation 4, the employee was covered by the Insurance from April 1990 to September 1990. She has also relied upon the deposition of the Shaileshkumar H. Shah, Exh.-9 which specifically shows that deceased was covered by the insurance. The father of the deceased was also examined at Exh.-7. She has also stated that the accident took place on 30/12/1999 and deceased expired on 2/1/1991. She has produced other documents and evidence which I have referred earlier. When she was asked that whether the applicant is covered by the ESI Act, it was submitted that the applicant was covered by the ESI Corporation. Explanation report was also produced and investigation report was also produced which prima facie shows that deceased died on account of fire and explosion. There is no dispute to the fact that the accident took

place on 30/12/1990 and the deceased expired on 2/1/1991.

15.Ms. Asha Gupta, learned advocate for the original applicant has invited my attention to the order of this Court in FA 186/2004 with CA 621/2004 (Coram:A.M.Kapadia, J.) decided on 10/5/2005 in the case of Regional Director, ESI Corporation, Ahmedabad vs. Taraben Dahyabhai Patel. She has also invited my attention to the copy of the original award passed by the Labour Court, Vadodara dated 7/1/2003 in the matter of Taraben Dahyabhai Patel vs. Regional Director, ESI Corporation, Ahmedabad, where identical issue arose before the Labour Court and in that case also, the applicant was serving in ABS Plastics Ltd. which is also an employer before this Court.

16.In the aforesaid matter of Taraben, the facts were that the deceased Dahyabhai Patel was in service on 7/11/1990 in ABS Plastics Company Ltd. During the course of his employment, as he was not feeling well, he was removed to hospital and ultimately on 8/11/1990 he has expired. In view

of his sudden death, the heirs and legal representatives of deceased Dahyabhai had filed application for claiming compensation under provisions of ESI Act. In that case, the deceased was covered by insurance being Insurance No.37/2780039 and contribution period begins from 1/10/1989 to 31/3/1990 and corresponding benefit period begins from 1/7/1990 to 31/12/1990. In that case, the deceased was working regularly and he has worked up to 8.00 hours and on that day the deceased has worked overtime in this behalf. At that time, when the deceased was complained for chest pain, he was removed to Dipak Foundation for primary aid but when his condition was worsened, he was taken to Gorva Dispensary and thereafter he was referred to another hospital and before he can reach to that hospital, he has expired on late night on 7/11/1990. So, ultimately, he was declared dead on 8/11/1990 in view of employment injury.

17. In the said case, the application was filed by the heirs of the deceased which was rejected by the employer on 26/2/1990 on the ground that they

are not covered by ESI Act.

18. In that case also, the documentary evidence was produced and the issues were raised and ultimately it may be noted that the deceased was covered insurance from 1/10/1989 to 31/3/1990 and after March, 1990 his salary was increased. As his salary was increased, subsequently, he was out of coverage, however he was in service till November 1990, that has been proved. It was case of the ESI Court that the contribution of his salary was also deduction from 31/3/1990 and after 31/9/1990 as his salary was increased, his contribution was not taken. The ESI Court relied upon Regulation 4 of the Act and as per the said regulation, the benefit period is from 1st July, 1990 to December, 1990. At that time, he has expired in this behalf because the corresponding benefit period is up to 1/12/1990. After going through the provisions of the Act, definition of insurance person under 2(14), Regulation 4 and after considering the judgments in the case of Tirupur **Textiles Private Limited, Ammapalyam, Tirupur vs. ESI Corporation (by the Regional Director, Madras) reported in**

1988 (1) LLN 688, ESI Corporation vs. N.P.Ranganayak Naidu and another of Karnataka High Court, reported in 2001 (2) LLJ 67 and Regional Director, ESI Corporation vs. M.Ganesan of Madras High Court reported in 2001 (1) LLN 381, the ESI Court held that if the person is an employee and his contribution has been deducted then the benefit period and corresponding benefit period be given advantage to them, and in that case an identical situation arose, the ESI Court has granted the relief in this behalf.

19.Being aggrieved and dissatisfied with the said order, the ESI Corporation has filed appeal before this Court being First Appeal No.186 of 2004 with Civil Application No.621 of 2004 before this Court and this Court (Coram:A.M.Kapadia, J.) decided the matter on 10/5/2005 and observed in para 3 observed as under:

> “This Court find itself in complete agreement with the reasoning, ultimate conclusion and the resultant award made by the ESI Court. According to this Court, no order conclusion

could have been reached by the ESI Court except the one reached by it."

20. In para 4 also my brother Justice Mr.A.M.Kapadia has observed like this.

"It may be noted that this appeal is filed under Section 82 of the Act and, as per the provision contained under Section 82(2) of the Act, an appeal shall lie to High Court from an order of an ESI Court, if it involves substantial question of law. Mr.Hemant S. Shah, learned advocate of the appellant is unable to point out, what substantial question of law is involved in this appeal which is required to be decided by this Court."

21. Mr.Hemant Shah, learned advocate for the Corporation has vehemently submitted that it is no doubt true that the ESI Court in an identical situation has decided this point and this Court has confirmed the judgment of the trial Court in this behalf. However, he has stated that the ESI

Court has not considered the definition of employee as contained under Section 2(9) of the Act, and once the ESI Court has not considered, there is no occasion to consider said definition by this Court also and therefore, this Court may not follow the judgment of this Court (Coram:A.M.Kapadia, J.).

22.Mr.Shah, learned advocate has stated that, being aggrieved and dissatisfied with the judgment of this Court, the Regional Director, ESI Corporation has already filed Letters Patent Appeal before this Court being LPA Stamp No.1170 of 2005 in First Appeal No.186 of 2004. However, still the matter is under objection and matter is still not admitted. Be that as it may, LPA is neither admitted nor the Corporation has been able to obtain any order in this behalf and therefore, I am bound to follow the decision of this Court wherein this Court confirmed the view of the trial court in this behalf. In view of the same, the appeal is dismissed with no order as to costs.

23.Ms. Asha Gupta, learned advocate for the original

applicant has relied upon the judgment of the Madras High Court in the case of Tirupur Textiles (Private) Ltd;, Ammapalyam, Tirupur vs. ESI Corporation and others reported in 1998 Labour Law Notes 688. Here, Regulation 4 has been considered and benefit of Regulation 4 has been granted. Similarly, here the benefit of Regulation 4 is there in this behalf. The learned advocate for the original applicant has also produced letter from the Registrar, Madras High Court dated 13/6/1991. Against the case mentioned in the letter, no appeal has been filed and the judgment has become final.

Observation and Findings:

24. I have considered all the facts and circumstances of the case. In view of the fact that the employee was covered by the Insurance from April 1990 to September 1990 and therefore, benefit period starts from 1st January 1991 and as he was expired on 2/1/1991, so, in view of the provisions of the Act, particularly Sections 2(9) and 2(14) of the Act and Regulation 4, the respondent

herein-original applicant was covered under the contribution period and corresponding benefit period in this behalf. In fact, the Trial Court has also came to the same conclusion. Though Mr.Shah, learned advocate for the appellant herein has argued vehemently the matter, he has not been able to assail the order of the learned Trial Judge in this behalf. In my view, the learned Judge has given very cogent and convincing reason to award the compensation. After considering the documentary and oral evidence which has been produced by the parties, in my view, no other conclusion could have been reached.

25. The learned advocate for the Corporation prays that I should stay the judgment of this Court as the Corporation desires to file appeal in this behalf. The learned advocate for the original applicant strongly object to the said part in this behalf. It may be noted that in this case the incident took place on 30/12/1990 and ultimately the person concerned expired on 2/1/1991. Thereafter, ESI Application No.4 of 1991 was filed before the competent court and the court has

delivered the judgment on 9/1/2003. Being aggrieved and dissatisfied with the said judgment, the Corporation has filed appeal somewhere on March, 2003.

26.It may be noted that during the pendency of appeal, the Corporation has prayed for the stay of the aforesaid order being Civil Application No.2095 of 2003. When the aforesaid civil application was filed before this Court, my learned Brother Hon'ble Justice Mr.N.G.Nandi on 13/1/2004 pleased to pass the following order:

> “It is stated by Mr.H.S.Shah, learned advocate for the applicant that this application is not pressed and be permitted to be withdrawn. Application dismissed as withdrawn. Rule discharged.”

27.Therefore, right from the order of the Trial Court i.e. January 2003 and thereafter from January 2004, there is no stay of the judgment of ESI Court. Now, when this Court finally disposed of the matter in June 2007, there is no question

of granting stay because the benefit of the Act ought to have been granted to the heirs of the employee where the incident has been taken place of 1990 and therefore, prayer of Mr.Shah, learned advocate for staying of the aforesaid judgment and order is rejected.

28. Mr.Shah, learned advocate for the appellant is unable to point out the substantial question of law is involved in this behalf. Even the learned advocate has not been able to prove the question of law much less the substantial question of law.

29. Over and above, I come to the same conclusion. For the same, I rely upon the judgment in the case of Tirupur Textiles (Private) Ltd., Ammapalyam, Tirupur vs. ESI Corporation and others, reported in LLN 1988 Madras High Court 688, where in identical situation, the Court has observed Employees' State Insurance General Regulations, 1950, regulation 4 and 5- employee-employment injury- contribution period- definition of- insured employee suffering employment injury- on date of accident employee getting salary of more

than Rs.1,000/- due to increase in dearness employee but was covered by corresponding benefit period-employee, held, is entitled to permanent disablement benefit from Employees' State Insurance Corporation.

30. I also rely upon identical other judgment of Madras High Court in the case of Regional Director, ESI Corporation vs. M.Ganesan, reported in 2001 (1) LLN 381 and judgment of the High Court of Karnataka in the case of ESI Corporation, Bangalore vs. Mysore Lamp Works Ltd., Bangalore, where in para 10, the Court has observed as under:

> “... From the above decision, it makes clear that an employee who was an employee at the commencement of the contribution period, continues to be an employee till the end of contribution period irrespective of increase in wages during the subsequent months of the contribution period. In other words, the status of an employee who happens to be an employee as per the definition of Section 2(9) continues to be an employee even if his

wages exceed the limit provided in the proviso to Section 2(9)(b) of the Act. Their Lordships have discussed at length what is the contribution period and benefit period and how one year is divided between the two periods under the Act....”

30.1) In view of the aforesaid discussion, the appeal will have to be dismissed on the ground that deceased Himmatsinh was an “employee” within the meaning of Section 2(9) of the act and also “insured person” within the meaning of Section 2(14) of the Act. In this case, employee was covered by insurance From 1/4/1990 to 30/9/1990 and he has expired on 2/1/2001. Therefore, he has covered by Regulation 4, particularly contribution period and corresponding benefit period which I have set out here in this behalf. I have considered the documentary evidence produced in this behalf.

30.2) Over and above, in another identical matter, the Labour Court, Vadodara has given the judgment and the said judgment was assailed before this

Court (Coram:A.M.Kapadia, J.). I have gone through the reasoning given by the Labour Court i.e. matter of Taraben Dahyabhai Patel and I have also gone through the order by this Court (Coram:A.M.Kapadia, J.) dated 10/5/2005 in the matter of Regional Director, ESI Corporation vs. Taraben Dahyabhai Patel and in view of the finding of both the Trial Court as well as this Court, the appeal requires to be dismissed. Over and above, I have considered the judgment of the High Court of Madras in the case of Tirupur Textiles (Private) Ltd., Ammapalyam, Tirupur (supra) and the judgment in the case of Regional Director, ESI Corporation vs. M.Ganesan (supra) and other judgments and the judgment of the Trial Court referred also. In view of all these judgments, the judgment of the Trial Court in the present case can be upheld and therefore, the present appeal is required to be dismissed.

31.A faint attempt of Mr.Shah, learned advocate for the ESI Corporation is that they have filed LPA before the Division Bench of this Court in this behalf. No order has been produced before this

Court in this behalf and therefore, I am bound by the judgment of my brother justice Mr.A.M.Kapadia.

32. In view of the same and in view of the judgment of this Court as well as three judgments referred above, the appeal requires to be dismissed.

33. In view of the reasons stated above, the appeal is dismissed with no order as to costs. The appellant herein is directed to comply with the order of the ESI Court forthwith.

34. As regards interim order also, it is also rejected in view of the order passed by this Court on 13/1/2004.

(K.M.Mehta, J.)

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